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Perbadanan Nasional Bhd v Yip Yee Foo & Anor

B HIGH COURT (KUALA LUMPUR) — SUMMONS NO D-22–1511 OF 2008
AZIZAH NAWAWI J
8 NOVEMBER 2016

C *Civil Procedure — Judgments and orders — Setting aside — Second defendant applied to set aside judgment in default — Whether judgment served on second defendant — Whether application time-barred — Whether application should be dismissed in limine — Rules of Court 2012 O 42 r 13*

D The plaintiff had commenced an action against the defendants to claim for money owing under a share subscription agreement entered between the parties. The second defendant had failed to enter appearance on the said action hence judgment in default ('JID') was entered against him. About seven years later, the second defendant had filed the present application vide encl 29 to set aside the JID and vide encl 43 for discovery. The plaintiff submitted that the JID had been served to the second defendant on 9 December 2008 and since the present application was filed more than 30 days after the receipt of the JID by the second defendant in contrary with O 42 r 13 of the Rules of Court 2012 ('the ROC'), hence the application was out of time, bad in law and must be dismissed in limine. The second defendant on the other hand submitted that there was no receipt of service of the JID as the AR card was not exhibited by the plaintiff hence the 30 days period had not lapsed.

G **Held,** dismissing the application with costs:

(1) In the present case since there was sufficient evidence of posting, hence the JID was deemed to have been served on the second defendant. In addition, there was no necessity for the plaintiff to rely on an endorsed AR registered card. It was sufficient to show that the writ and statement of claim were sent to the second defendant at his last known address. Thus, the JID was a regular judgment (see paras 26 & 28).

(2) The 30 days requirement under O 42 r 13 of the ROC was mandatory. On the facts, since there was no explanation by the second defendant for the delay in making the present application and that there was no application for an extension of time, then the application to set aside was not in compliance with O 42 r 13 of the ROC and should be dismissed in limine (see paras 20, 23 & 27).

[Bahasa Malaysia summary

Plaintif telah memulakan tindakan terhadap defendan-defendan untuk menuntut wang yang kena dibayar di bawah perjanjian langganan saham yang dimasuki di antara pihak-pihak. Defendan kedua telah gagal untuk memasukkan kehadiran atas tindakan tersebut maka penghakiman ingkar ('JID') dimasukkan terhadapnya. Lebih kurang tujuh tahun kemudian, defendan kedua memfailkan permohonan ini melalui lampiran 29 untuk mengenepikan JID tersebut dan melalui lampiran 43 bagi penemuan. Plaintif berhujah bahawa JID tersebut telah diserahkan kepada defendan kedua pada 9 Disember 2008 dan memandangkan permohonan ini difailkan lebih daripada 30 hari selepas penerimaan JID tersebut oleh defendan kedua bertentangan dengan A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM'), maka permohonan adalah di luar masa, tidak betul dari segi undang-undang dan mesti ditolak in limine. Defendan kedua sebaliknya berhujah bahawa tidak terdapat penerimaan serahan JID tersebut kerana kad AR tidak ditunjukkan oleh plaintif maka tempoh 30 hari tidak luput.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam kes ini memandangkan terdapat keterangan mengepos yang mencukupi, maka JID tersebut dianggap telah diserahkan ke atas defendan kedua. Selanjutnya, tidak perlu bagi plaintif bergantung ke atas kad berdaftar AR yang telah diendorskan. Ia adalah mencukupi untuk menunjukkan bahawa writ dan pernyataan tuntutan dihantar kepada defendan kedua di alamat yang terakhir yang diketahui. Oleh itu, JID tersebut adalah penghakiman biasa (lihat perenggan 26 & 28).

(2) Keperluan 30 hari di bawah A 42 k 13 KKM tersebut adalah mandatori. Atas fakta, memandangkan tidak terdapat penjelasan oleh defendan kedua bagi kelewatan dalam membuat permohonan ini dan tidak terdapat permohonan bagi pelanjutan masa, oleh itu permohonan untuk mengenepikan tidak mematuhi A 42 k 13 KKM dan patut ditolak in limine (lihat perenggan 20, 23 & 27).]

Notes

For cases on setting aside, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5431–5500.

Cases referred to

Adnan bin Ishak & Ors v APT Associates Sdn Bhd [2015] MLJU 3; [2015] 1 LNS 61, CA (refd)

Mohd Azlan bin Hj Zainal Abidin & Ors v Pegawai Penerima Syarikat Cosmopro & Ors [2015] 10 MLJ 107; [2015] 5 CLJ 836, HC (refd)

Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647; [2003] 4 CLJ 533, CA (refd)

Sivamurthy s/o Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja [2013] 5 MLJ 533; [2012] 9 CLJ 598, CA (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 4 CLJ 175, CA (refd)

Legislation referred to

Companies Regulations 1966 Form 63
Rules of Court 2012 O 42 r 13

Alan Wong (Asyraf Aziz with him) (Zaid Megat & Murad) for the plaintiff.
Ramesh (Ramesh & Loo) for the first defendant.
Wong Guo Bin (Lim Soon Seng with him) (Izral Partnership) for the second defendant.

Azizah Nawawi J:

APPLICATION

[1] The second defendant has filed two applications in this court:

(a) encl (29) is an application to set aside the judgment in default ('JID') dated 14 November 2008; and

(b) encl (43) is an application for discovery.

[2] After hearing the parties on encl (29) I have dismissed the same with costs. Consequentially, encl (43) is struck out with no order as to costs.

THE SALIENT FACTS

[3] The plaintiff is a company, which upon request, had provided a financial assistance to one company HK Movie Entertainment Sdn Bhd ('HK Movie'). The shareholders of HK Movie were:

(a) Focal House Holding Sdn Bhd;

(b) the second defendant (also a shareholder of Focal House); and

(c) Amernodin bin Osman ('the proponent').

[4] A share subscription agreement was entered on 10 May 2001 between the plaintiff, HK Movie, Amernodin (as a proponent) and Focal House and the second defendant. Among the terms that were agreed under this agreement are:

(a) the plaintiff is to provide financial assistance to HK Movie, by subscribing two million units of ordinary shares and 1.8 million units of preferential shares from HK Movie at the rate of RM1 per share;

(b) in return, HK Movie will pay the plaintiff a fixed non-cumulative preferential dividends at the rate of 10%pa on the preferential shares, and 10% net dividend of enlarged share capital during the period of the plaintiff's investment. At the same time, the plaintiff has the right/option to redeem the entire shares by exercising the right to call the put option buy back; and

(c) the proponent (Amernodin) irrevocably agreed to provide an undertaking of put option to purchase the entire plaintiff's call shares amounting to 1.5 million at a buy-back price of 9%pa over the investment period.

[5] To supplement the share subscription agreement, a debenture was created on 10 May 2001 between the plaintiff and HK Movie. At the same time, a guarantee and indemnity agreement were also entered into on 10 May 2001 between plaintiff and the first and second defendants. It was agreed that both the first and second defendants are to stand as surety and guarantor, and also as the principal debtor and to pay every single money payable by HK Movie and/or the proponent to the plaintiff.

[6] The plaintiff had performed its part of the obligation under the agreement by fully paying to HK Movie RM2m for the ordinary shares and RM1.8m for the preferential shares.

[7] However, HK Movie and the proponent has failed to perform their part under the agreement in the following manner:

(a) failed to pay the fixed non-cumulative dividends which is payable for the amount of RM1.8m as at 30 June 2002;

(b) failed to buy back all the preferential shares from the plaintiff (despite a call had been exercised);

(c) failed to pay the net dividend for the ordinary shares; and

(d) failed to execute the put option when the plaintiff exercise the call on 17 December 2002.

[8] As against the first and the second defendants, they have also failed to pay as guarantor cum the principal debtor under the guarantee and indemnity agreement.

[9] On 2 December 2002 and 17 December 2002, the plaintiff issued two notices of demand to HK Movie and the proponent.

[10] On 21 December 2003, the plaintiff exercised its right under the debenture and appointed a receiver and manager to manage the assets of HK Movie.

[11] On 21 June 2005, the plaintiff issued the notices of demand to the first and second defendants premised on the guarantee and indemnity.

[12] On 8 August 2008, the plaintiff filed this suit against the first and the second defendants. The writ and statement of claim were served on both the first and second defendants on 8 September 2008 by AR registered post.

[13] The second defendant failed to enter appearance, and a judgment in default ('JID') was entered against the second defendant on 14 November 2008. The JID was then served on the second defendant on 9 December 2008.

[14] The first defendant contested the suit and entered an appearance and filed a statement of defence. At the High Court, the plaintiff's application for summary judgment against the first defendant was dismissed. However on appeal, the plaintiff's application for summary judgment was allowed by the Court of Appeal and judgment was entered against the first defendant. On appeal to the Federal Court, the first defendant's application was dismissed. Thus the summary judgment entered against the first defendant by the Court of Appeal was affirmed by the Federal Court.

[15] About seven years later, on 27 August 2015, the second defendant filed this application in encl (29) to set aside the JID.

[16] Subsequently, on 16 February 2016, the second defendant filed an application in encl (43) for discovery seeking to discover the following documents:

(a) all documents and correspondences relating to the debenture dated 10 May 2001, including the right to take control over the assets and properties of HK Movie and the disposal of the same;

(b) any documents relating to the appointment of the receiver and manager ie one Mr Wan Idris bin Wan Ibrahim;

(c) any directions given to the receiver and manager and his power;

(d) any documents showing the utilisation of the funds/proceeds received by the receiver and manager from the disposal of the assets of HK Movie; and

(e) all documents showing the financial position of HK Movie as at 31 December 2001 and the estimate value of all the assets of HK Movie

based on Form 63 dated 20 August 2009 and 20 February 2010.

[17] Having considered the affidavits and the submissions of the parties, this court has dismissed encl (29), and struck out encl (43) as it is now redundant.

THE FINDINGS OF THE COURT

[18] It is common ground that an application to set aside the JID dated 14 November 2008 must comply with O 42 r 13 of the Rules of Court 2012 ('the ROC 2012'), which reads:

> 13 Setting aside or varying judgment and orders
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> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after receipt of the order or judgment by him.

[19] In the present case, the plaintiff submits that the JID has been served to the second defendant with a letter dated 9 December 2008, and the said letter was duly endorsed with proof of service by Pos Malaysia. Therefore, since this application was filed more than 30 days after receipt of the JID, and was filed nearly seven years after the JID was entered, the plaintiff submits that this application is out of time, bad in law and must be dismissed in limine.

[20] I am of the considered opinion that there is merit in the plaintiff's submission, as cases have established the compliance with the 30 days requirements under O 42 r 13 of the ROC 2012 is mandatory. In the case of *Mohd Azlan bin Hj Zainal Abidin & Ors v Pegawai Penerima Syarikat Cosmopro & Ors* [2015] 10 MLJ 107; [2015] 5 CLJ 836, the court held that:

> A perusal of O 42 r 13 disclose that the drafters have used the terminology 'shall' ie, 'shall make an application within 30 days after receipt of the order or judgment by him'. The word 'shall' denotes that the provision is mandatory and must be adhered to strictly. In *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85; [1996] 3 CLJ 321, the Court of Appeal held that the word 'must' is equated in meaning to the word 'shall' and implies a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. Siti Norma Yaakob JCA (as he then was) in delivering the judgment of the court held that the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion.

[21] The same position was taken by the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647; [2003] 4 CLJ 533, where Justice Nik Hashim JCA held:

> However, the appellants' applications did not comply with O 42 r 13 of the Rules

A of High Court 1980 which requires that a party intending to set aside a judgment must make his application to the curt and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him ...

... Further, there was no explanation whatsoever from the appellants for their delay in approaching the court and that they had not prayed for extension of time to make their application. In these circumstances, there was clearly no need for the merits of the appellants' application to be considered and in fact they should be dismissed in limine.

[22] In a recent case of the Court of Appeal of *Adnan bin Ishak & Ors v APT Associates Sdn Bhd* [2015] MLJU 3; [2015] 1 LNS 61, the court reaffirmed the same position and held that:

Delay in applying — where a defendant's application to set aside is not made within 30 days period prescribed by r 13, and there is no explanation for the delay in approaching the court and there is no application for an extension of time to apply, the application to set aside will be dismissed in limine, and the court will not consider the merits of the application.

[23] On the facts of this application and premised on the authorities cited above, since there is no explanation by the second defendant for the delay in making this application and that there is no application for an extension of time to apply, then I am of the considered opinion that the application to set aside must be dismissed in limine, and that this court will not consider the merits of the application.

[24] However, the second defendant takes the position that there was no delay in making this application. The second defendant submitted that under O 42 r 13 of the ROC 2012, the plaintiff must prove that the JID have been served and received by the second defendant. In the present case, the second defendant submits that the plaintiff has failed to prove that the JID was served on, and received by the second defendant. There was no receipt of service of the JID as the AR card was not exhibited by the plaintiff. Therefore, the second defendant submits that since the plaintiff has failed to prove that the JID was received by the second defendant, then the 30 days period has not lapsed.

[25] Alternatively, the plaintiff submitted that if the court found that there was delay in filing this application, the second defendant submitted that the delay was not inordinate. It is because the second defendant was not aware of the JID all these while.

[26] However, based on the decision of the Court of Appeal in *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 4 CLJ 175 there is no necessity to show the AR card and in this case since there is sufficient evidence of posting, hence the JID order is deemed

to have been served on the second defendant. In *Yap Ke Huat*'s case, the court held as follows:

> [30] In respect of this defendant, the prepaid AR registered post acknowledgement card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective. What is demanded in O 10 r 1 of the RHC is that the writ (and in this case including the statement of claim) be sent by prepaid AR registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules (and statement of claim) is deemed to be served on the defendant. There is no necessity to prove that the acknowledgement of the AR registered posting has been returned.

[27] Thus, I agree with the plaintiff that this application is not in compliance with O 42 r 13 of the ROC 2012 and should be dismissed in limine.

[28] However, as the parties have submitted on the merits of the application, then this court will deal with the next issue, that is, whether the JID has been obtained irregularly. The second defendant submits that the JID was obtained irregularly because the plaintiff has failed to establish proper service by AR registered post. However, based on the decision of the Court of Appeal in *Sivamurthy s/o Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja* [2013] 5 MLJ 533; [2012] 9 CLJ 598, there is no necessity for the plaintiff to rely on an endorsed AR registered card. It is sufficient to show that the writ and SOC is sent to the second defendant at his last known address. Therefore, the JID is a regular judgment.

[29] The last issue raised was whether there is any merit in the second defendant's defence. On this, I agree with the plaintiff that the merits of the suit, namely the liability of both defendants under the guarantee and indemnity, had been considered and tried all the way to the Federal Court whereby the decision of the Court of Appeal to allow summary judgment against the first defendant was affirmed.

[30] With regards to the issue on security, cl 4 of the guarantee and indemnity agreement provides that the obligations of the guarantors shall not be discharged except by performance and only to the extent of the performance, and shall not be impaired by any failure to assert any rights against the company or the proponent.

[31] In the premise, I find that there is no merit in the second defendant's application and will dismiss the same with cost.

Application dismissed with costs.

Reported by Dzulqarnain Ab Fatar